IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0101

CHARLES LOKEY and VANESSA LOKEY,
Plaintiffs and Appellants,

vs.

ANDREW J. BREUNER and A.M. WELLES, INC.,
Defendants and Appellees.

On Appeal from the 18th Judicial District Court
Gallatin County
Hon. W. Nels Swandal

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ISSUES PRESENTED

1. Whether the District Court erred in dismissing A.M. Welles, Inc., because one who undertakes to direct traffic has a duty to exercise reasonable care.

2. Whether the District Court's assertion that Charles Lokey violated § 61-8-324, MCA, invades the province of the jury and is clearly erroneous.

STATEMENT OF CASE

This is a personal injury action arising out of an accident that occurred when a truck driver hauling gravel for A.M. Welles, Inc., overtook and began to pass Charles Lokey, who was riding a bicycle on South 19th Avenue in Bozeman, and then stopped and gestured for an oncoming motorist, Andrew Breuner, who was waiting to make a left turn, to proceed, whereupon Breuner, relying on that gesture, turned in front of Lokey, who was unable to stop and suffered serious injuries. *Amended Complaint* (Doc. 26),[1] at ¶¶ 2-7.

Lokey and his wife sued Breuner and Welles to recover compensation for his injuries and her loss of consortium, alleging:

> The Lokeys' injuries and damages were caused by defendants' negligence, including but not limited to . . . the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

Id., at ¶ 8.

[1] The parenthetical refers to the District Court's docket number.

The District Court dismissed Welles, stating:

> While it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him, Welles was no more responsible for Lokey that he was for any of the other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there. . . .

Order Granting Motion to Dismiss (Doc. 40), copy attached as Appendix 1, at 4.

Although the Lokeys never argued that "a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear," but only that one who undertakes to direct traffic has a duty to exercise reasonable care,[2] that distinction was lost on the District Court, which dismissed one of two defendants who contributed to cause the accident.

In addition, the District Court suggested that Lokey was negligent:

> . . . Lokey . . . never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. . . .

Id., at 4-5.

Encouraged by that gratuitous suggestion, Breuner filed a motion for summary judgment, arguing that Lokey was negligent as a matter of law because

[2] *See Plaintiffs' Response to Welles' Motion to Dismiss* (Doc. 36), at 9-15.

he violated § 61-8-324, MCA, which prohibits overtaking and passing on the right. *Defendant's Motion for Summary Judgment* (Doc. 43). Although the District Court found that there are genuine issues of material fact precluding summary judgment, and denied Breuner's motion, it stated:

> It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation. . . .

Order Denying Summary Judgment (Doc. 62), copy attached as Appendix 2, at 2.

Thus, in addition to dismissing one of two defendants who contributed to cause the accident, the Court entered a finding of fact and conclusion of law – now the law of the case – that invades the province of the jury, is clearly erroneous and will prevent adjudication on the merits.

STATEMENT OF FACTS

The Lokeys initially sued Breuner. *Complaint* (Doc. 1). Then, after he testified in deposition that Welles' driver gestured for him to turn, and he relied on that gesture, they sought and obtained leave to file an amended complaint, which alleges:

> 2. On September 7, 2006, Breuner stopped in heavy traffic on South 19th Avenue in Bozeman to wait for an opportunity to make a left turn into a private driveway, causing traffic congestion behind him.
>
> 3. Shortly thereafter, an employee of Welles, driving a Welles gravel truck with trailer, approaching from the opposite direction and seeing the traffic congestion Breuner caused, stopped and gestured for Breuner to turn.

4. The driver of the Welles truck had just overtaken Charles Lokey, who was riding his bicycle alongside the truck and trailer as near to the right side of the road as practicable, in compliance with the law.

5. Seeing the Welles truck driver's gesture, Breuner made his turn, directly in front of Lokey, who could not avoid collision.

6. Charles Lokey struck the side of Breuner's vehicle and suffered bodily injuries, including a mild traumatic brain injury, and as a result of those injuries he incurred medical expenses and suffered physical pain and discomfort, emotional distress and a loss of earning capacity. In addition, his injuries curtailed his established lifestyle, depriving him of the enjoyment thereof, and left him with permanent impairments, susceptible to degenerative sequelae and future damages.

7. As a result of Charles Lokey's injuries, Vanessa Lokey suffered a loss of consortium and serious emotional distress.

8. The Lokeys' injuries and damages were caused by defendants' negligence, including but not limited to Breuner's negligence in creating the traffic congestion that compelled the Welles truck driver to stop and let him turn, the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

Amended Complaint (Doc. 26), at ¶ 2-8.

Welles filed a motion to dismiss, arguing that the Lokeys' amended complaint fails to state a claim upon which relief can be granted. However, recognizing that this case presents an issue of first impression in Montana and the outcome may depend on how that issue is framed, Welles misstated the issue:

> . . . [W]hether a driver who yields the right-of-way to a vehicle waiting to make a left turn by stopping and signaling owes a duty of care to determine whether the turn is safe is a question of first impression in the state of Montana. . . .

Motion to Dismiss (Doc. 31), at 4.

The Lokeys opposed Welles' motion, for two reasons. First, it is settled law in Montana that one who assumes to act, even gratuitously, as one driver may gesture for another to turn in front of him, must act carefully; and second, whether taking the Lokeys' factual allegations as true or considering the parties' deposition testimony, a jury could find that Welles' driver failed to exercise reasonable care and shares liability for the accident. *Plaintiff's Response to Welles' Motion to Dismiss* (Doc. 36), at 1-2.

The Lokeys filed the parties' depositions, and summarized their testimony as follows:

> Depositions have been taken, and the facts are largely uncontested. Charles Lokey, a laser engineer and graduate student in mathematics at MSU who rode his bicycle to work when weather permitted, left his job a Quantum Composers on September 7, 2006, to go home. . . . Quantum Composers is located near 19th Avenue and Stucky Road, and Lokey lived near Costco, so he rode north on 19th Avenue. . . . He usually rides on the road, but when traffic is heavy, as it was that day, he does the courteous thing – he moves over to the side of the road so motorists can pass. . . .
>
> As Lokey rode north on 19th Avenue, he rode on the fog line, but when motorists passed he moved over to give them some room. . . . As he approached Babcock Street, Welles' driver, James Bohrman, who had been following him for some distance, caught up. . . .

> Bohrman was driving a 10-wheel dump truck with a trailer. . . . Although he would later testify that he "played tag" with Lokey on 19th Avenue, he told the police, "I *followed* bike all the way from Kagy." . . . When he overtook Lokey, he forced Lokey to move over and ride on the paved shoulder of the road. . . . However, he never passed Lokey. . . .
>
> As they neared Babcock, Bohrman noticed Breuner, stopped in the southbound lane of 19th Avenue, trying to make a left turn into the Langohr's Flowerland parking lot. . . . Traffic was heavy, and the line of cars behind him extended back through the intersection of 19th and Babcock. . . . Some of them were trying to pass Breuner on the right, and it was obvious to Bohrman that he was not going to move until he could complete his turn. . . . So Bohrman stopped and gestured for him to turn. . . . However, Bohrman forgot about Lokey. . . .
>
> When Bohrman gestured for Breuner to turn, his truck and trailer prevented Breuner from seeing Lokey, and prevented Lokey from seeing Breuner. . . .
>
> As Breuner turned into the parking lot, he passed directly in front of Lokey, who was coming up alongside Bohrman's truck and, unable to stop, hit the side of his pickup. . . .

Id., at 2-4 (citations omitted).

The District Court characterized all of that as "alleged facts . . . [which] add nothing to the resolution of this issue," *see Order Granting Motion to Dismiss* (Appendix 1), at 1, and dismissed Welles without addressing the Lokeys' contention that one who undertakes to direct traffic has a duty to exercise reasonable care, stating:

> While it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him, Welles was no more responsible for Lokey that he was for any of

> the other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there. . . .

Id., at 4.

Moreover, although the District Court never indicated that it treated Welles' motion to dismiss as a motion for summary judgment, it clearly considered matters outside the Lokeys' complaint:

> . . . the Welles driver in this case was being polite and courteous. . . .

Id., at 3.

> . . . it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him . . .

Id., at 4.

> . . . Lokey . . . never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. . . .

Id., at 4-5.

> . . . when conditions exist that would cause a large vehicle such as a dump truck to be stopped, it would make sense for a bicyclist to proceed cautiously.

Id., at 5.

Encouraged by those gratuitous remarks, Breuner filed a motion for summary judgment, arguing that Lokey was negligent as a matter of law because he violated § 61-8-324, MCA, which prohibits overtaking and passing on the right. *Defendant's Motion for Summary Judgment* (Doc. 43). Although the District Court found that there are genuine issues of material fact precluding summary judgment, and denied Breuner's motion, it stated:

> It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation.

Order Denying Summary Judgment (Appendix 2), at 2.

The District Court certified Welles' dismissal as final for purposes of appeal, and the Lokeys filed a timely notice of appeal. They also appealed the District Court's assertion that Lokey violated § 61-8-324, MCA. Although this Court has indicated that it will not review the second issue, the Lokeys are filing a motion for reconsideration, and will address both issues below.

STANDARDS OF REVIEW

Whether the District Court properly granted a motion to dismiss is a conclusion of law, which this Court reviews to determine whether the District Court's interpretation and application of the law is correct. *Public Lands Access Ass'n, Inc. v. Jones*, 2008 MT 12, ¶ 9, 341 Mont. 111, 176 P.3d 1005.

This Court reviews summary judgment rulings *de novo*, using the same criteria applied by the District Court. *Schuff v. Jackson*, 2008 MT 81, ¶ 14, 342

Mont. 156, 179 P.3d 1169.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Welles because one who undertakes to direct traffic, as one driver may gesture for another to turn in front of him, has a duty to exercise reasonable care. That is not to say he has a duty to determine whether other lanes are clear, or whether the turn can safely be made, but if he assumes to act he must act carefully, and it should be left to a jury to decide whether Welles' driver shares liability for the resulting accident.

The District Court also erred in announcing that Lokey violated § 61-8-324, MCA, which invades the province of the jury and is clearly erroneous. Having concluded that there are genuine issues of material fact precluding summary judgment, the District Court should have left that issue to the jury.

ARGUMENT

1. The District Court erred in dismissing Welles because one who undertakes to direct traffic has a duty to exercise reasonable care.

This case presents an issue of first impression in Montana – whether one who undertakes to direct traffic, as one driver may gesture for another to turn in front of him, has a duty to exercise reasonable care. Although this is an issue of first impression, its resolution requires nothing more than the application of settled law to the facts of this case.

1.1 It is settled law that one who assumes to act, even gratuitously, must act carefully.

In Montana, one who assumes to act, even gratuitously, must act carefully. *Nelson v. Driscoll*, 1999 MT 193, ¶ 36-40, 295 Mont. 363, 983 P.2d 972 (holding that a police officer assumed a duty to protect a motorist from harm when he told her to park her car and walk home). *See also Jackson v. State*, 287 Mont. 473, 490, 956 P.2d 35, 46 (1998) (holding that an adoption agency assumed a duty to avoid making negligent misrepresentations when it began volunteering information to potential adoptive parents); *Kopischke v. First Continental Corp.*, 187 Mont. 471, 481-82, 610 P.2d 668, 673-74 (1980) (holding that an automobile dealer who reconditioned a used truck for resale had a duty to exercise reasonable care to render it safe); *Sult v. Scandrett*, 119 Mont. 570, 573-77, 178 P.2d 405, 406-07 (1947) (holding that a railroad agent who assured a cattle shipper his scales were in good working order had a duty to continue weighing cattle and could not discontinue the service without notice); *Vesel v. Jardine Mining Co.*, 110 Mont. 82, 92, 100 P.2d 75, 80 (1939) (holding that an employer who provided medical services to an injured employee was bound to exercise reasonable care); and *Stewart v. Standard Publishing Co.*, 102 Mont. 43, 50, 55 P.2d 694, 696 (1936) (holding that a business had a duty to exercise reasonable care when it undertook to remove snow from a city sidewalk).

Although this rule derives from the jurisprudence of Justice Cardozo, who

observed "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all," *Glanzer v. Shepard,* 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922), this Court adopted it from *The American Law of Torts* § 9:22 and the *Restatement (Second) of Torts* § 323. *Nelson,* 1999 MT 193, ¶ 37.

The *Restatement (Second) of Torts* § 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

This is hornbook law. Prosser states that a duty may arise, even if the act is gratuitous, if by acting the actor induces another to rely on it. Prosser, *Law of Torts* (4th ed.) 626, § 93. He even gives the example that if a truck driver gratuitously gestures for a following driver to pass, "he will be liable if he fails to exercise proper care and injury results." *Id.*, at 343, § 56.

In Montana, it is settled law that one who assumes to act, even gratuitously, must act carefully, and applying this rule to a driver who gestures for another to turn in front of him compels the conclusion that he has a duty to exercise

reasonable care.

1.2 Other jurisdictions applying the same rule have held that one who undertakes to direct traffic, as one driver may gesture for another to turn in front of him, has a duty to exercise reasonable care.

Courts in other jurisdictions that have adopted Judge Cardozo's jurisprudence or the *Restatement (Second) of Torts* § 323 have held that a driver who gestures for another to turn in front of him has a duty to exercise reasonable care. In *Thorne v. Miller*, 317 N.J.Super. 554, 722 A.2d 626 (1998), the court explained:

> . . . Driving is rife with risk and it is all too often that car accidents lead to death or bodily injury. The high degree of risk should encourage responsibility, interdependence, and cooperation among all drivers in a variety of traffic situations. Indeed, growing congestion had led to an increased use of gestures between drivers. At some traffic obstacles, gestures are standard operating procedure, and without the use of these signals, traffic flow would not be efficient. The risk of a careless gesture is very high when compared to the goal of accident prevention. It is relatively easy for waving drivers to check if passage is safe, and if unable to so, a driver contemplating a gesture should not take on the responsibility of directing traffic. Because gestures are so common and the risk of injury from car accidents so severe, it is only fair to impose a duty upon waving drivers. . . .

Thorne, 317 N.J. Super. at 560, 722 A.2d at 629. *See also Kemp v. Armstrong*, 40 Md.App. 542, 546, 392 A.2d 1161, 1164 (1978); *Wulf v. Rebbun*, 25 Wis.2d 499, 503-04, 131 N.W.2d 303, 306 (1964); and *Thelen v. Spilman*, 251 Minn. 89, 97, 86 N.W.2d 700, 706 (1957). The same rule has been applied to drivers who gesture

to pedestrians. *See, e.g., Alston v. Blythe*, 88 Wash.App. 26, 36-37, 943 P.2d 692, 698 (1997); *Bell v. Giamarco*, 50 Ohio App.3d 61, 63, 553 N.E.2d 694, 697 (1988); *Miller v. Watkins*, 355 S.W.2d 1, 4-5 (Mo. 1962); and *Sweet v. Ringwelski*, 362 Mich. 138, 144, 106 N.W.2d 742, 745 (1961).

When the plaintiff is not the driver to whom the gesture was given, but a third party, as in this case, courts rely on the *Restatement (Second) of Torts* § 324, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or third person upon the undertaking.

See, e.g., Lindsley v. Burke, 189 Mich.App. 700, 704-05, 474 N.W.2d 158, 160-61 (1991); *Askew v. Zeller*, 361 Pa.Super. 35, 38-41, 521 A.2d 459, 462 (1987); and *Cunningham v. National Service Industries, Inc.*, 174 Ga.App. 832, 835-38, 331 S.E.2d 899, 902-04 (1985).

Even in jurisdictions that have not adopted Judge Cardozo's jurisprudence or the *Restatement (Second) of Torts* § 323 or § 324, courts agree that a driver who

gestures to another has a duty to exercise reasonable care if the other driver's view is obstructed and the gesturing driver knew or should have known the gesture would be relied upon. *See, e.g., Woods v. O'Neil*, 54 Mass.App.Ct. 768, 771, 767 N.E.2d 1119, 1122 (2002), n. 5; *Williams v. O'Brien*, 140 N.H. 595, 599, 669 A.2d 810, 813 (1995); *Giron v. Welch*, 842 P.2d 863, 864-65 (Utah 1992); *Perret v. Webster*, 498 So. 2d 283, 286 (La. 1986); *Dace v. Gilbert*, 96 Ill.App.3d 199, 200-01, 421 N.E.2d 377, 378 (1981); *Gamet v. Jenks*, 38 Mich.App. 719, 725, 197 N.W.2d 160, 164 (1972); and *Kerfoot v. Waychoff*, 501 So.2d 588, 589 (Fla. 1987).

Welles will argue, as it did below, that "better reasoned" cases reject the view that one who undertakes to direct traffic has a duty to exercise reasonable care. However, there is nothing better reasoned about those cases. They simply support Welles' position. There is a split of authority, and cases on both sides are well reasoned. However, in jurisdictions that have adopted Judge Cardozo's jurisprudence or the *Restatement (Second) of Torts* § 323 or § 324, a driver who undertakes to direct traffic has a duty to exercise reasonable care.

1.3 Applying the same rule to this case compels the conclusion that Welles' driver had a duty to exercise reasonable care when he undertook to direct traffic.

The existence of a duty depends upon the foreseeability of injury. As this Court explained in *Hinkle v. Shepard School Dist. #37*, 2004 MT 175, 322 Mont.

80, 93 P.3d 1239:

> Put simply . . . we look to whether or not the injured party was within the scope of the risk created by the alleged negligence of the tortfeasor – that is, was the injured party a foreseeable plaintiff?
>
> . . .
>
> . . . the inquiry must be whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff.

Id., at ¶ 30.

If Welles' driver, knowing that Lokey was riding alongside his truck, could have foreseen that a collision might occur, he had a duty to exercise reasonable care:

> Every person is responsible for injury to the person . . . of another, caused by his/her negligence.
>
> Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he/she fails to act as an ordinarily prudent person would act under the circumstances.

MPI 2.d 2.00 Negligence – Defined.

The existence of a duty also requires a weighing of policy considerations for and against the imposition of liability, including the moral blame attributable to the defendant's conduct, the prevention of future harm, the extent of the burden placed on the defendant, the consequences to the public, and the availability of insurance. *See Hinkle*, 2004 MT 175, ¶ 25. In this case, it was certainly foreseeable to Welles' driver that encouraging Breuner to turn could endanger

Lokey, and moral blame attaches because it is beyond cavil that one who undertakes to direct traffic ***should*** exercise reasonable care. As the *Thorne* court observed, "[b]ecause gestures are so common and the risk of injury from car accidents so severe, it is only fair to impose a duty upon waving drivers." *Thorne*, 317 N.J.Super. at 560, 722 A.2d at 629. This is particularly true when the gesturing driver knew or should have known his vehicle prevented the other driver from seeing an approaching bicyclist. *See, e.g., Williams*, 140 N.H. at 599, 669 A.2d at 813. As more people park their cars and ride bicycles to work, applying the *Restatement (Second) of Torts* § 324 to the facts of this case will promote safety and prevent future harm.

Moreover, the burden on Welles, a trucking company with commercial insurance, is minimal. Its policy provides ample coverage, *see Welles' Responses to Plaintiffs' Second Discovery Requests*, copy attached to *Plaintiffs' Response to Welles' Motion to Dismiss* (Doc. 36) as Exhibit 5, at 3 (Response to Request for Production No. 2), and there is no reason to think that requiring truck drivers to exercise reasonable care will affect the availability of insurance.

Under these circumstances, it is entirely consistent with Montana law and public policy to conclude that Welles' driver had a duty to exercise reasonable care, and leave it to a jury to decide whether he shares liability for the accident out of which this case arises.

1.4 The District Court erred in dismissing Welles.

Cases should be resolved on the merits whenever possible. On a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiffs, and its allegations taken as true. *Fraunhofer v. Price* (1979), 182 Mont. 7, 12, 594 P.2d 324, 327. All that needs to be shown to survive a motion to dismiss is that there is a set of facts under which the plaintiffs could recover. *Glaude v. State Comp. Ins. Fund* (1995), 271 Mont. 136, 139, 894 P.2d 940, 942. This Court has stated that it will only affirm the dismissal of a complaint if it finds that the plaintiffs are not entitled to relief under any set of facts that could be proven in support of their claim. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552.

Although the District Court never indicated that it treated Welles' motion to dismiss as a motion for summary judgment, it clearly considered matters outside the Lokeys' complaint. Under these circumstances, Welles had the burden of establishing the complete absence of any genuine issue of material fact, and the Lokeys were entitled to the benefit of all reasonable inferences that may be drawn from the offered proof. *Smith v. Kerns*, 281 Mont. 114, 116, 119, 931 P.2d 717, 718, 720.

Whether taking the Lokeys' factual allegations as true, or considering the parties' deposition testimony, it is beyond cavil that the Lokeys' amended

complaint states a claim upon which relief can be granted, and raises issues of fact that must be left to the jury. The Lokeys alleged that Welles' driver "knew or should have known Charles Lokey was riding alongside his truck and trailer." *Amended Complaint* (Doc. 26), at ¶ 8. The District Court found "it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road . . . ." *Order Granting Motion to Dismiss* (Appendix 1), at 4. Welles' driver admitted in deposition that he forgot about Lokey. *Bohrman Depo.* (Doc. 37), at 20:2-10, and 22:11-16. Under these circumstances, and applying the rule that one who assumes to act must act carefully, a jury could reasonably conclude that Welles' driver failed to exercise reasonable care and shares liability for the accident out of which this case arises.

The District Court dismissed Welles, stating:

> . . . There simply is no authority for Lokey's (sic) proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there.

Order Granting Motion to Dismiss (Appendix 1), at 4.

No authority? Although the District Court acknowledged "numerous cases" in which this Court has held that one who assumes to act, even gratuitously, must act carefully, it overlooked or ignored the rule articulated in those cases, which, applied to this case, compels the conclusion that Welles' driver had a duty to exercise reasonable care when he undertook to direct traffic.

While overlooking or ignoring Montana law, the District Court seized upon a California case:

> . . . As stated in *Gilmer*: "the fact that one polite driver elects to waive his right of way to a left-turning vehicle does not cloak that driver with moral opprobrium. We should encourage cooperative drivers, not penalize them." . . . A courteous driver, signaling a turning driver that he has permission to cross in front of him does not translate to assurance that all lanes are clear.

Id., at 4 (citation omitted).

The District Court's reliance on *Gilmer v. Ellington*, 70 Cal.Rptr.3d 893, 159 Cal.App. 4 190 (2008), is misplaced, for two reasons. First, there was no allegation or evidence in *Gilmer* that the defendant knew or should have known the plaintiff was about to pass him; and second, California evidently has not adopted the *Restatement (Second) of Torts* § 323 or 324.

This case is distinguishable. Welles' driver knew Lokey was riding alongside his truck, and this Court has adopted the *Restatement (Second) of Torts* § 323, which states that one who assumes to act must act carefully.

Ignoring the fact that this Court has adopted the *Restatement (Second) of Torts* § 323, the District Court characterized the rule that one who assumes to act must act carefully as a slippery slope:

> . . . What then happens in those instances where there is a tall truck in which the signaling driver sits and a very small vehicle arriving below the level of his mirror because it is so close beside him? That is just the problem here and this Court will not tread down that proverbial slippery slope.

Id., at 4.

What happens? Drivers who undertake to direct traffic will be required to exercise reasonable care. Welles' driver had no obligation to stop and invite Breuner to turn, and but for his gesture the accident would not have occurred. We only find ourselves on a slippery slope if we allow people to direct traffic without requiring them to exercise reasonable care.

The issue is not whether "a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear." *See Order Granting Motion to Dismiss* (Appendix 1), at 4. The Lokeys never argued that Welles' driver was negligent in yielding the right-of-way, or that he had a duty to determine whether other lanes were clear, but only that when he took it upon himself to direct traffic he had a duty to exercise reasonable care.

Welles will urge this Court to redefine the issue, as it did below, because it is easier to argue that a driver who gestures for another to turn in front of him has no duty to determine whether the turn can safely be made, than to argue that one who undertakes to direct traffic has no duty to exercise reasonable care, particularly here, where its driver knew Lokey was riding a bicycle alongside his truck. However, that only underscores the weakness of Welles' arguments. The District Court was easily distracted, but this Court should address the issue the Lokeys raised.

It is settled law in Montana that one who assumes to act, even gratuitously, as one driver may gesture for another to turn in front of him, must act carefully, and that whether a defendant exercised reasonable care is a question of fact that should be left to the jury. *Nelson*, 1999 MT 193, ¶ 40, *citing Smith v. Kerns,* 281 Mont. 114, 117, 931 P.2d 717, 719 (1997).

Whether taking the Lokeys' factual allegations as true, or considering the parties' deposition testimony, the District Court erred in dismissing Welles because its driver had a duty to exercise reasonable care, and a jury could find that he shares liability for the Lokeys' injuries and damages.

2. The District Court's assertion that Lokey violated § 61-8-324, MCA, invades the province of the jury and is clearly erroneous.

Breuner filed a motion for summary judgment that Lokey violated § 61-8-324, MCA, which prohibits overtaking and passing on the right:

> **Overtaking vehicle on right.** (1) The operator of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
>
> (a) when the vehicle overtaken is making or about to make a left turn; or
>
> (b) upon a roadway with unobstructed pavement of sufficient width for two or more lanes of vehicles moving lawfully in the direction being traveled by the overtaking vehicle.
>
> (2) The operator of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting safe movement. The movement may not be made by driving off the

pavement or main-traveled portion of the roadway.

§ 61-8-324, MCA.

The District Court asserted that Lokey violated that statute and was cited accordingly, but found that there are genuine issues of material fact precluding summary judgment:

> It is true that Lokey violated § 61-8-324, M.C.A. and was cited for that violation. . . . The defendant argues that because Lokey received a citation, paid the fine for his ticket and therefore admitted violation of the statute, there is no genuine issue of material fact regarding his negligence *per se* in this matter. Lokey counters that there are facts in dispute regarding the circumstances which resulted in the accident, and that he didn't fight the ticket does not mean he agreed with the officer's assessment of the situation. Additionally, Lokey argues that officer and expert testimony does not create irrefutable facts. The Court agrees. Although the Court will not allow Lokey to argue whether the citation was appropriate or accurate, it is up to the finder of fact to determine the sequence of events which lead to the issuance of the citation. . . .

Order Denying Summary Judgment (Appendix 2), at 2-3.

Although the District Court found that there are genuine issues of material fact precluding summary judgment, its incongruous assertion that Lokey violated § 61-8-324, MCA, is now the law of the case. *State v. Carden*, 170 Mont. 437, 439-40, 555 P.2d 738, 739-40 (1976) ("when an issue is once judicially determined, that should be the end of the matter").

This Court should set aside the District Court's assertion that Lokey violated § 61-8-324, MCA, because it misconstrued the law, there are genuine

issues of material fact precluding summary judgment, and the assertion that Lokey violated the law invades the province of the jury and is clearly erroneous.

In construing a statute, the district courts are required to give meaning to each provision:

> **Role of the judge – preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

§ 1-2-101, MCA.

Section 61-8-324, MCA, does not prohibit passing on the right. It prohibits overtaking and passing on the right. However, the District Court overlooked or ignored that, stating:

> [Welles] argues that [a] bicyclist is held to the same rules of the road as the operator of a vehicle. . . . Those rules make it unlawful to pass a vehicle on the right side, unless the roadway in that direction is at least two lanes wide or the vehicle being passed is making a left turn. . . .

Order Granting Motion to Dismiss (Appendix 1), at 2 (citations omitted).

> . . . Lokey . . . never addressed the fact that he met none of the conditions under which he would be allowed to pass a vehicle on the right pursuant to § 61-8-324, M.C.A. . . .

Id., at 4-5.

Nothing in the District Court's analysis suggests it noticed that § 61-8-324,

MCA, only prohibits overtaking and passing on the right. It never even mentioned the word "overtake." Not once, even though the words "overtake," "overtaking" and "overtaken" appear five times in the statute.

The District Court's construction of § 61-8-324, MCA, evident in its gratuitous assertion that Lokey met none of the conditions under which he would be allowed to pass a vehicle on the right, deprives "overtake" of any meaning or effect, and is clearly erroneous.

There is no evidence that Lokey overtook and passed Welles' truck. He was riding on the side of the road, near the fog line, allowing motorists to pass, when Welles' driver overtook and began to pass him. *Lokey Depo.*, copy attached to *Plaintiffs' Response to Welles' Motion to Dismiss* (Doc. 36) as Exhibit 2,[3] at 24:17 through 25:2 and 25:22 through 26:12. Then, while he was riding alongside the truck, Welles' driver stopped and gestured for Breuner to turn. *Id.*, at 25:22 through 27:11, and 30:24 through 32:24; *Bohrman Depo.* (Doc. 37), at 10:16 through 11:6, 15:16 through 17:14, 18:17 through 19:2, and 19:7-14; and *Breuner Depo.* (Doc. 38), at 29:20 through 30:8.[4] Lokey continued forward and collided with Breuner, but since Welles' truck never passed him, he did not overtake and

[3] Breuner has the original, but refused to file it, so the Lokeys have asked the District Court to order him to file it, and supplement the record on appeal.

[4] Welles' driver admitted in deposition that he forgot about Lokey. *Bohrman Depo.* (Doc. 37), at 20:2-10, and 22:11-16.

pass Welles' truck in violation of § 61-8-324, MCA.

Since there is no evidence that Lokey overtook and passed Welles' truck, Breuner hired an expert to say he did, and argued that since he was cited for violating § 61-8-602, MCA, which requires bicyclists to comply with § 61-8-324, MCA, and forfeited bond, he must be guilty. Never mind that he suffered a brain injury, and was unable to defend himself. Breuner argued that the forfeiture of bond amounts to an admission of guilt. *Defendant's Motion for Summary Judgment* (Doc. 43).

Ignoring the fact that expert reports are not evidence, that the opinions set forth therein are inadmissible hearsay, and that evidence of the issuance of a citation is inadmissible, the District Court found that there are genuine issues of material fact precluding summary judgment:

> . . . The defendant argues that because Lokey received a citation, paid the fine for his ticket and therefore admitted violation of the statute, there is no genuine issue of material fact regarding his negligence *per se* in this matter. Lokey counters that there are facts in dispute regarding the circumstances which resulted in the accident, and that he didn't fight the ticket does not mean he agreed with the officer's assessment of the situation. Additionally, Lokey argues that officer and expert testimony does not create irrefutable facts. The Court agrees. Although the Court will not allow Lokey to argue whether the citation was appropriate or accurate, it is up to the finder of fact to determine the sequence of events which lead to the issuance of the citation. . . .

Order Denying Summary Judgment (Appendix 2), at 2-3.

Having found that, the District Court's gratuitous assertion that Lokey

violated § 61-8-324, MCA, is not only incongruous, but clearly erroneous. Since there are genuine issues of material fact precluding summary judgment, the issue must be left to the jury. *Payne v. Sorenson*, 183 Mont. 323, 327, 599 P.2d 362, 365 (1979) (where conflicting evidence is presented, issues of negligence and causation must be decided by a jury).

The District Court's ruling that it "will not allow Lokey to argue whether the citation was appropriate or accurate" is also erroneous. Evidence of the issuance of a citation is inadmissible. *Smith v. Rorvik*, 231 Mont. 85, 91, 751 P.2d 1053, 1056 (1988).

The district courts must "exercise the greatest self-restraint in interfering with the constitutionally mandated processes of a jury decision." *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727. Here, the District Court has not exercised that restraint. Its gratuitous assertion that Lokey violated § 61-8-324, MCA, invades the province of the jury, is clearly erroneous, and will prevent adjudication on the merits. It will have a significant impact on the course of discovery and trial, settlement will be rendered more difficult, and the value of any verdict will be questionable, requiring another appeal and a second trial.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the District

Court's dismissal of Welles, set aside its gratuitous assertion that Lokey violated § 61-8-324, MCA, and remand this case for further proceedings consistent with those rulings.

DATED this 3 day of June, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2002 for Windows, is 7,041 words, not averaging more than 280 words per page, including certificate of service and certificate of compliance.

DATED this 3 day of June, 2010.

Martin R. Studer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing was duly served upon the following by depositing the same, postage prepaid and addressed as indicated, in the mail this 3 day of June, 2010.

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